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Modernizing the Private Placement Framework: A Summary of Recent SEC Rulemaking

The Securities and Exchange Commission (SEC) recently published extensive rules aimed toward modernizing aspects of the private placement framework of the federal securities laws. On January 14, 2021, the Final Rules were published in the Federal Register, slating them to become effective on March 15, 2021. The SEC's goal with these changes is to promote capital formation while preserving or enhancing important investor protections. This overview highlights rules likely to have a material impact on and influence over strategy for private offerings conducted by emerging companies and private funds across all industries, as well as investors.

Overview of notable changes

Summarized below are some of the key features of the Final Rules. Although not a complete guide to every change that was made, the following are notable takeaways that business leaders and practitioners alike should have on their radar as the Final Rules take effect on March 15, 2021:

Demo Days and Testing the Waters Communications

New Rule 148 will exempt certain “demo day” communications from the registration requirements of the Securities Act, balancing the needs of startup companies with the SEC's investor protection goals.

New Rules 206 and 241 will permit certain testing the waters communications prior to filing a Form C for Regulation Crowdfunding offerings (Rule 206) or filing a registration statement for registered offerings (Rule 241).

Revised Accredited Investor Verification Under Rule 506(c)

Amendments to Rule 506(c) of Regulation D will permit an issuer to more easily establish that a pre-existing investor remains accredited for subsequent sales of securities if the issuer previously took reasonable steps to verify the investor's accredited status.

Harmonizing Disclosure Requirements Under Regulation D with Regulation A

The SEC is amending Rule 502(b) of Regulation D, governing the financial information that non-reporting companies must provide to non-accredited, sophisticated investors participating in Regulation D offerings, to align with the financial information issuers must provide investors in Regulation A offerings. By aligning the disclosure requirements in Rule 502(b) with those in Regulation A, the SEC believes that additional issuers may consider including non-accredited, sophisticated investors in their 506(b) offerings, which would expand investment opportunities for non-accredited investors.

Regulation A Eligibility

Issuers registered under the Securities Exchange Act of 1934 (Exchange Act) which are delinquent in their Exchange Act reporting obligations will now be ineligible to rely on the exemption in Regulation A.

Increased Limits in Regulation A and Rule 504 Offerings

The maximum offering amount under Tier 2 of Regulation A will be increased from \$50 million to \$75 million, and the maximum offering amount for secondary sales under Tier 2 of Regulation A will be increased from \$15 million to \$22.5 million.

The maximum offering amount under Rule 504 of Regulation D will be increased from \$5 million to \$10 million.

Overhaul of Regulation Crowdfunding

The maximum offering amount will be increased from \$1.07 million to \$5 million.

For offerings of \$250,000 or less, the SEC will extend the current temporary exemption from certain financial statement requirements for offerings until August 28, 2022.

Investment limits for accredited investors will be removed, other than the (\$5 million) aggregate limit applicable to the offering.

The investment limits for non-accredited investors have been revised. Going forward, the aggregate amount of Regulation Crowdfunding securities sold to any non-accredited investor across all issuers

during any 12-month period shall not exceed: (i) the greater of \$2,200, or 5% of the greater of the investor's annual income or net worth (if either the investor's annual income or net worth is less than \$107,000); or (ii) 10% of the greater of the investor's annual income or net worth, not to exceed an amount sold of \$107,000 (if both the investor's annual income and net worth are equal to or more than \$107,000).

The SEC is adding a new exclusion from the Investment Company Act of 1940 to permit the use of certain special purpose vehicles to facilitate investing in Regulation Crowdfunding issuers.

Harmonization of Bad Actor Disqualification Lookback Periods

The SEC is harmonizing the bad actor disqualification provisions in Rule 506(d) of Regulation D, Rule 262(a) of Regulation A and Rule 503(a) of Regulation Crowdfunding by adjusting the lookback requirements in Regulation A and Regulation Crowdfunding.

New Integration Framework and Safe Harbors

New Rule 152 is focused on offering integration and provides a comprehensive integration framework composed of a general principle of integration and four safe harbors applicable to all registered and exempt securities offerings under the Securities Act, modernizing and simplifying the integration framework to keep up with developments in the capital markets and the evolution of communications technology.

For quick reference, the SEC has created a summary table showing these changes.

What this means to you

Going forward, the framework for private placements will be materially different as various exemptions will begin to coalesce around a more harmonious and consistent framework. In connection with the SEC's updated "accredited investor" definition, these amendments add momentum to the SEC's push to create regulatory landscape that opens up the investor pool for private placements while providing protections for investors who need it most.

Be on the lookout for our upcoming series of posts highlighting the more impactful rules changes in the coming weeks.

Contact us

Husch Blackwell's Securities & Corporate Governance and Startup teams will continue to monitor these changes and their implications for our clients. Should you have any questions, please do not

hesitate to contact Steve Barrett, Scott Brunner, Kirstin Salzman, Casey Kidwell, Brandon Warrington, or your Husch Blackwell attorney.